

DEVELOPER PARTICIPATION AGREEMENT MCCARTY COMMONS 24-INCH WATERLINE

This Developer Participation Agreement (the “Agreement”) is effective as of August 7, 2018 (the “Effective Date”), by and between the City of San Marcos, Texas, a home rule municipal corporation (the “City”), 630 East Hopkins Street, San Marcos, Texas 78666 and SLF II-McCarty, L.P., a Texas limited partnership (the “Owner”), 5949 Sherry Lane, Suite 800, Dallas, Texas 75225. The City and the Owner may be referred to in this Agreement, individually, as a “Party,” or collectively, as the “Parties.”

I. RECITALS

1.1 Section 212.071 of the Texas Local Government Code authorizes the City to cost participate with a developer of a subdivision or land to construct public improvements.

1.2 The Owner is constructing required public improvements in connection with the McCarty Commons development project, consisting of approximately 259 acres of land located at the intersection of McCarty Lane and IH-35 North in the City of San Marcos (the “McCarty Project”).

1.3 The City has approved a future capital improvement project to construct a 24-inch water line, a segment of which will run within the McCarty Project site. The location and general description of the waterline segment requested by the City to be constructed by the Owner are shown in **Exhibit A**, attached hereto and made a part hereof (the “Waterline Improvements”).

1.4 The Parties agree that it would be most efficient for the Owner to construct the Waterline Improvements concurrently with the Owner’s installation of the public improvements related to the McCarty Project.

1.5 For the reasons stated above, and in consideration of the mutual obligations of and benefits to the Parties, the Parties wish to enter into this Agreement setting forth the terms and conditions under which the City will pay for and the Owner will construct the Waterline Improvements.

II. AGREEMENT

2.1 Design, Bidding and Construction of Waterline Improvements

2.1.1 Design. The Waterline Improvements shall be constructed in accordance with the plans and specifications approved by the City and prepared by CP&Y, Inc. (the “Engineer”) as directed by the City (the “Approved Plans”). All changes to the Approved Plans are subject to the written approval of the City’s Director of Engineering and Capital Improvements.

2.1.2 Bidding. The Owner has solicited bids to construct the public improvements related to the McCarty Project and included the Waterline Improvements from a list of qualified contractors that have been mutually approved by the Owner and the City’s Director of Engineering

and Capital Improvements. The bids solicited by Owner were pursuant to a private bidding procedure as allowed by Section 212.071 of the Texas Local Government Code. The Waterline Improvements have been included as an add alternate item to the bid solicitation for the public improvements related to the McCarty Project. As of the Effective Date, bids from qualified contractors have been received, but have not been tabulated or awarded.. Owner shall be entitled to award the contract for the public improvements related to the McCarty Project, including the Waterline Improvements, to the bidder that the Owner reasonably determines is the most appropriate contractor to perform the work and provided that such award and construction contract complies with Section 2.2.1 below.

2.1.3 City Cost Participation. The estimated cost breakdown for the Waterline Improvements is set forth in **Exhibit B** attached hereto and made a part hereof. The City shall be responsible for payment of the actual costs to construct the Waterline Improvements according to the bid awarded under Section 2.1.2 above, in an amount not to exceed 30 percent of the Owner's total construction contract price for the public improvements related to the McCarty project, including the Waterline Improvements. If, after consideration by the City of any options to reduce the scope of work, the contract price for the Waterline Improvements exceeds 30 percent of the contractor's total construction contract price, then at Owner's election (i) this Agreement shall terminate and neither Party shall have any further obligations under this Agreement, or (ii) Owner, in its sole discretion, may elect to cover such excess cost.

2.1.4 Change Orders. Change orders may be approved by the City subject to the requirement that the total cost for the Waterline Improvements may not exceed 30 percent of the Owner's total construction contract price for the public improvements related to the McCarty Project, including the Waterline Improvements. The City Manager of the City may approve change orders up to \$50,000.00. Any change order in excess of \$50,000.00 is subject to the approval of the San Marcos City Council. The City agrees to reasonably cooperate in connection with the approval of any change orders that meet the requirements of this Section 2.1.4. If, after consideration by the City of any options to reduce the scope of work, the cost of any proposed change orders causes the cost for the Waterline Improvements to exceed 30 percent of the contractor's total construction contract price, then at Owner's election (i) this Agreement shall terminate and neither Party shall have any further obligations under this Agreement, or (ii) Owner, in its sole discretion, may elect to cover such excess cost.

2.1.5 Construction. The Waterline Improvements will be constructed by the Owner through the Owner's contractor according to the Approved Plans and in compliance with the City's applicable ordinances, standards and processes. The City acknowledges and agrees that Owner shall not be obligated to post or provide any fiscal surety for completion of the Waterline Improvements.

2.1.6 Performance Bond. The Owner will cause a performance bond to be provided for the benefit of the City to ensure completion of the Waterline Improvements. The bond must be executed by a corporate surety in accordance with the Chapter 2253 of the Texas Government Code.

2.1.7 Project Manager. The Owner will act as project manager in the construction of the Waterline Improvements. The City and the Engineer, however, will be entitled to conduct periodic

site visits and inspections during construction to determine compliance with the Approved Plans or applicable ordinances, standards and processes; provided that, however, such inspections shall be conducted promptly after any request by the Owner, and, to the extent such site visits and inspections relate to the Waterline Improvements, shall be at the City's sole cost and expense.

2.1.8 Independent Contractor. Except as otherwise provided in this Agreement and subject to the City's payment obligations set forth in this Agreement, the Owner shall be solely responsible for selecting, supervising and paying the construction contractor(s) and for complying with all applicable laws, including but not limited to all requirements concerning construction retainage, and for requiring in the construction contract for the contractor to comply with all applicable laws concerning workers compensation. The Parties agree and understand that all contractors, employees, volunteers and personnel furnished or used by the Owner in the installation of the Waterline Improvements shall be the responsibility of the Owner and shall not be deemed employees or agents of City for any purpose.

2.1.9 Completion. The contract with selected contractor shall establish an estimated completion date for the Waterline Improvements from the commencement of construction. The date of completion shall be the date on which the City accepts the Waterline Improvements for ownership, operation and maintenance in accordance with the City's applicable ordinances, standards and processes and provides written notice of such acceptance to the Owner.

2.1.10 Acceptance. The City shall accept the Waterline Improvements subject to the following:

a. The Owner shall provide to the City a notarized affidavit from the selected contractor stating that all bills for labor, materials, and incidentals incurred have been paid in full, that any claims from manufacturers, materialmen and subcontractors have been released, and that there are no claims pending of which Owner has been notified.

b. The Waterline Improvements shall have passed all customary City inspections under applicable ordinances and standards for acceptance of public improvements by the City.

c. The Owner is, otherwise, in compliance with the terms of this Agreement.

d. *The Owner shall have caused the selected contractor to provide a warranty and maintenance bond; provided that, however, expiration of the warranty period covered by such bond shall not be required to have occurred in order for the Waterline Improvements to be complete under Section 2.1.9 above.*

2.2 Construction Contract

2.2.1 Contractor Agreement. Prior to execution, Owner will provide the City with a copy of the proposed construction contract between Owner and the contractor for review and approval as to the requirements in this section and applicable parts of this Agreement. The City shall be named as a third-party beneficiary under the contract only to the extent of the City's interests in

relation to the Waterline Improvements. The contract must include provisions for the benefit of the City in connection with the Waterline Improvements as set forth below.

a. Insurance Requirements. The construction contract must include requirements that the contractor shall, at a minimum, maintain commercial general liability and automobile liability insurance coverage for all of its operations under the contract in connection with the Waterline Improvements. The City shall be named as an additional insured under such liability insurance coverage at the same limits of coverage provided to the Owner, together with provisions providing for waiver of subrogation. All persons engaged in work under the contract must be covered by workers' compensation insurance.

b. Indemnification and Release. The contract with the Owner's contractor must name the City as an additional indemnitee whenever the Owner is also named as an indemnitee and shall provide, in substance that the contractor shall release, indemnify, hold harmless, and defend the City, its officers, agents, and employees (the "Indemnified Parties") from and against any and all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys and other professionals and all court or arbitration or other dispute resolution costs) arising out of or resulting from the performance of the work described in the construction contract related to the Waterline Improvements, provided that any such claim, cost, loss or damage:

- (i) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property, including the loss of use resulting therefrom, and
- (ii) is caused in whole or in part by any negligent act or omission of the contractor, any subcontractor, any supplier, any person or organization directly or indirectly employed by any of them to perform or furnish any of the work described in the contract related to the Waterline Improvements or anyone for whose acts any of them may be liable.
- (iii) **EMPLOYEE PERSONAL INJURY CLAIMS: TO THE FULLEST EXTENT PERMITTED BY LAW, THE CONTRACT SHALL PROVIDE THAT THE CONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNIFIED PARTIES AND SHALL ASSUME ENTIRE RESPONSIBILITY AND LIABILITY (OTHER THAN AS A RESULT OF AN INDEMNIFIED PARTY'S SOLE OR GROSS NEGLIGENCE) FOR ANY CLAIM OR ACTION BASED ON OR ARISING OUT OF THE PERSONAL INJURY, INCLUDING THE DEATH, OF ANY EMPLOYEE OF THE CONTRACTOR, SUBCONTRACTORS, OR ANY SUB-SUBCONTRACTOR, OR OF ANY OTHER ENTITY FOR WHOSE ACTS THEY MAY BE LIABLE, WHICH OCCURRED OR WAS ALLEGED TO HAVE OCCURRED ON THE PROJECT SITE OR IN CONNECTION WITH THE PERFORMANCE OF THE WORK. THE CONTRACT WILL PROVIDE THAT THE CONTRACTOR WILL INDEMNIFY THE INDEMNIFIED**

PARTIES EVEN TO THE EXTENT THAT SUCH PERSONAL INJURY WAS CAUSED OR ALLEGED TO HAVE BEEN CAUSED BY THE COMPARATIVE OR CONCURRENT NEGLIGENCE OF ANY INDEMNIFIED PARTY. THIS INDEMNIFICATION SHALL NOT BE LIMITED TO DAMAGES, COMPENSATION, OR BENEFITS PAYABLE UNDER INSURANCE POLICIES, WORKERS COMPENSATION ACTS, DISABILITY BENEFITS ACTS, OR OTHER EMPLOYEES BENEFIT ACTS.

2.2.2 *Warranty.* The contract with the Owner's contractor will provide for at least a one-year warranty against defects in materials and workmanship. This warranty obligation shall be covered by any performance or payment bonds required of the contractor under the terms of the construction contract and shall be assignable to the City with respect to the Waterline Improvements.

2.3 Invoices and Payments

2.3.1 *Applications for Payment.* The Owner may submit to the City written applications for payment up to once per month for work on the Waterline Improvements that has been inspected by the City and properly performed through the last day of the calendar month immediately preceding each application submission date. The application for payment to the City shall be for the amount of the actual costs incurred by Owner associated with the City's portion of such work. The application for payment shall be in a form reasonably acceptable to City and must include a breakdown of actual costs of the Waterline Improvements with supporting documentation, including all invoices, payment receipts and any other documentation reasonably requested by the City to support the City's expenditure of public funds.

2.3.2 *City Payment.* Within thirty (30) days after receipt of each complete (as reasonably determined by the City) written application for payment from Owner, the City will remit payment to Owner in the amount of the application for payment.

2.3.3 *Payments to Subcontractors and Suppliers.* The Owner shall be solely and exclusively responsible for compensating any of its contractors, employees, subcontractors, materialmen and/or suppliers of any type or nature whatsoever and insuring that no claims or liens of any type will be filed against any property owned by the City arising out of or incidental to the performance of any service performed pursuant to this Agreement. In the event a statutory lien notice is sent to the City, the City may withhold payments until resolution of any subcontractor's or materialman's claim(s) for payments due, and the Owner shall, where no payment bond covers the work, upon written notice from the City, immediately obtain a bond at its expense and hold City harmless from any losses that may result from the filing or enforcement of any said lien notice.

2.3.4 *Payment of City's Engineer.* The City shall be solely and exclusively responsible for payment of the City's engineer (CP&Y, Inc.) for services provided under contract with the City related to the Waterline Improvements.

2.4 Default and Remedies

2.4.1 Default and Remedies. If either Party is in default of any of its material obligations under this Agreement, the non-defaulting Party shall provide written notice of such default to the other. If the defaulting Party does not cure the default within 30 days after receipt of such notice or, if the default is not reasonably susceptible to cure within 30 days and a cure is not begun within such 30-day period and, thereafter, continuously and diligently pursued to completion on a schedule approved by the other Party, then the non-defaulting Party may, at its sole discretion, terminate this Agreement. In the event of termination by the City, the City may withhold all further payments to the Owner, except for such sums due for work properly completed through the date of termination. In the event of a material default by the City for reasons other than a default by the Owner, the Owner may file suit for actual damages. In addition to the foregoing, either Party may pursue any remedies available at law or in equity for breach of this Agreement by the other. The prevailing Party in any litigation arising from the activities under this Agreement shall be entitled to recover reasonable attorney's fees and costs of litigation.

2.5 Miscellaneous

2.5.1 Books and Records. All of the Owner's books and other records related to the bidding and construction of the Waterline Improvements shall be reasonably available for inspection by the City upon reasonable prior notice.

2.5.2 Entire Agreement; Amendment; Binding on Successors. This Agreement constitutes the entire agreement between the Parties hereto and may be amended only by a written document signed by the Parties. This Agreement shall be binding upon the successors and assigns of the Parties.

2.5.3 Assignment. The assignment of all or part of this Agreement by a Party is not valid without the written consent of the other Party, except that:

- a.* the Owner may assign this Agreement in connection with the sale of the McCarty Project site or to any other property owner benefitted by the public improvements related to the McCarty Project;
- b.* this Agreement may be pledged as collateral in connection with any loan to the Owner related to the McCarty Project; and
- c.* this Agreement may be assigned to a wholly owned subsidiary of or entity under common ownership with the Owner.

Any assignment under subsections (a), (b) and (c), however, shall not be effective as to the City until written notice of the assignment is provided to the City.

2.5.4 Effect of Force Majeure Event. A Party will not be deemed to be in default or otherwise in violation of any term of this Agreement to the extent such Party's action, inaction or omission is the result of Force Majeure Event. The Parties agree to use commercially reasonable

efforts to promptly resolve any Force Majeure Event that adversely and materially impacts their performance under this Agreement. A Force Majeure Event pauses a Party's performance obligation for the duration of the event but does not excuse it. "Force Majeure Event" means any event or occurrence that is not within the control of such Party and prevents a Party from performing its obligations under this Agreement, including, without limitation, any act of God; act of a public enemy; war; riot; sabotage; blockage; embargo; failure or inability to secure materials, supplies or labor through ordinary sources by reason of shortages or priority; labor strike, lockout or other labor or industrial disturbance (whether or not on the part of agents or employees of either Party); civil disturbance; terrorist act; power outage; fire, flood, windstorm, hurricane, earthquake or other casualty; any law, order, regulation or other action of any governing authority; any action, inaction, order, ruling moratorium, regulation, statute, condition or other decision of any governmental agency having jurisdiction over the Party, over the Project or over a Party's operations.

2.5.5 *Subject to Ordinances and Laws.* This Agreement and the obligations of the Parties hereunder are subject to all valid and applicable ordinances, fees (including City impact fees and/or pro rata fees), rules, regulations, and laws of all governmental agencies having lawful jurisdiction over them.

2.5.6 *Funding by City.* The City acknowledges and agrees that the obligations of the City to make the payments required in this Agreement have been properly and fully appropriated and funded by the San Marcos City Council, and such payment obligations are not subject to the annual appropriation by the San Marcos City Council of funds for such obligations as part of the City's ordinary budget and appropriations process.

2.5.7 *Applicable Law and Venue.* This Agreement shall be governed and construed under and in accordance with the laws of the State of Texas. Jurisdiction and venue for any matter arising out of this Agreement shall be in Hays County, Texas. Jurisdiction and venue in federal court for matters arising out of this Agreement shall be in the United States District Court for the Western District of Texas, Austin Division.

2.5.8 *Authority to Execute.* The City warrants that this Agreement has been approved by the City Council in accordance with all applicable public meeting and public notice requirements (including, but not limited to, notices required by the Texas Open Meetings Act) and that the individual executing this Agreement on behalf of the City has been authorized to do so. Owner warrants that the execution of this Agreement is duly authorized in conformity with the articles of incorporation, bylaws, partnership agreement or other applicable organizational documents of Owner and that the individual executing this Agreement on behalf of Owner has been authorized to do so.

EXECUTED to be effective as of the Effective Date first written above.

[SIGNATURES ON FOLLOWING PAGES]

CITY OF SAN MARCOS:

By: _____
Bert Lumbreras, City Manager

SLF II - MCCARTY, L.P.,
a Texas limited partnership

By: The Stratford Company, L.P.,
a Texas limited partnership,
its general partner

By: Stratford Management, Inc.,
a Texas corporation,
its general partner

By: _____

Name: _____

Title: _____

EXHIBIT A

Project Map or Site Plan and Description of the Waterline Improvements

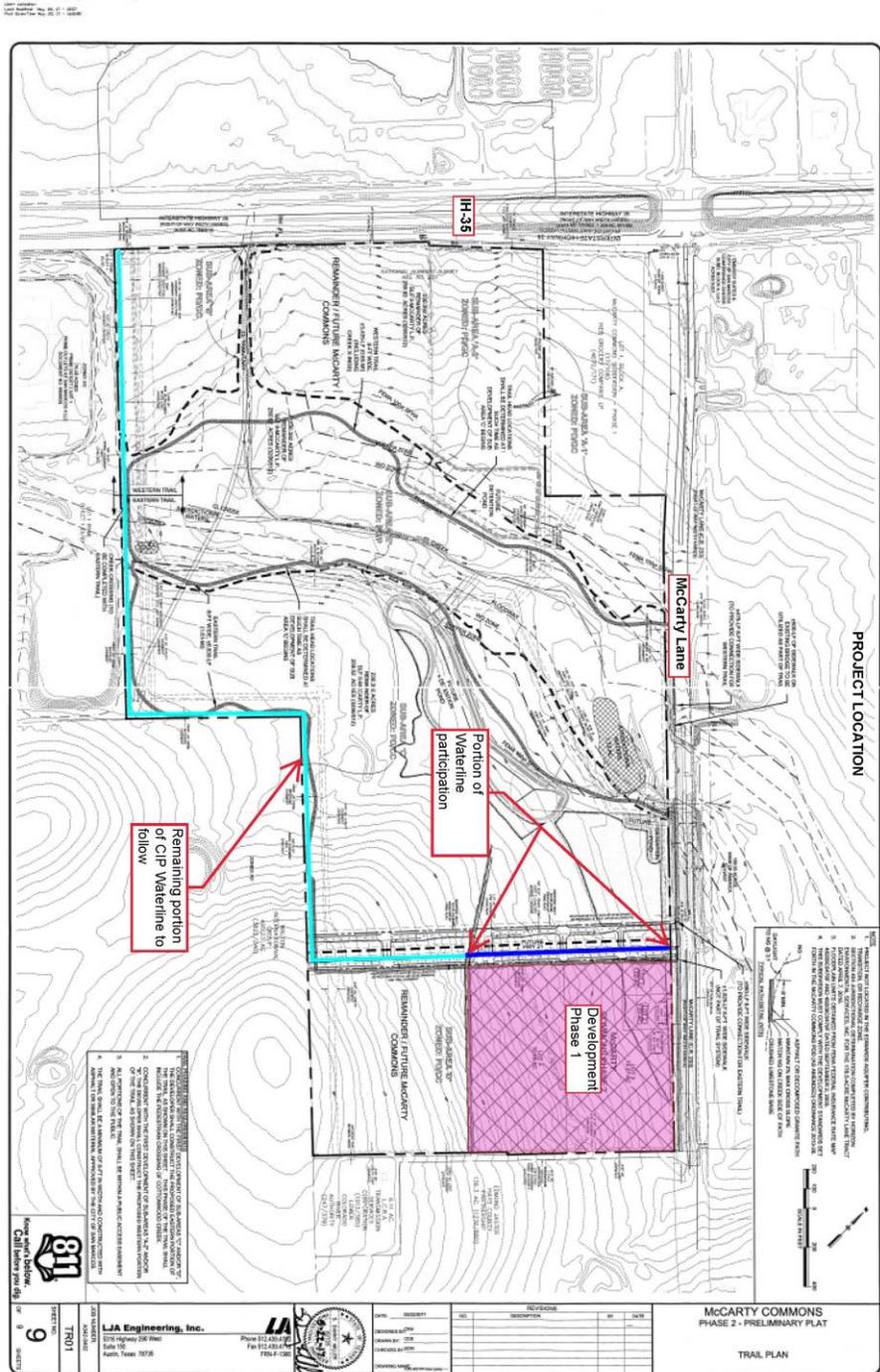


EXHIBIT B
Itemized Cost Estimate for all Waterline Improvements

City of San Marcos - Cottonwood Creek 24-inch Water Main Extension						
Phase I						
Opinion of Probable Cost						
BID ITEM NO.	SPEC NO.	DESCRIPTION	UNITS	QNTY	UNIT COST	TOTAL COST ¹
1	101S-C	PREPARING RIGHT-OF-WAY	LS	1	\$ 8,200.00	\$ 8,200.00
2	509S-1	TRENCH EXCAVATION SAFETY PROTECTIVE SYSTEMS	LF	1,430	\$ 4.00	\$ 5,800.00
3	510-AR-12	PIPE, 12-IN DIA., PVC, ALL DEPTHS, INCLUDING EXCAVATION AND BACKFILL	LF	150	\$ 90.00	\$ 13,500.00
4	510-AR-24	PIPE, 24-IN DIA., DI, ALL DEPTHS, INCLUDING EXCAVATION AND BACKFILL	LF	1,280	\$ 175.00	\$ 224,000.00
5	510-KR	DUCTILE IRON FITTINGS	TON	3.7	\$ 9,000.00	\$ 33,300.00
6	511S-A-12	VALVES, GATE, 12-IN DIA., ALL DEPTHS	EA	2	\$ 6,000.00	\$ 12,000.00
7	511S-A-24	VALVES, GATE, 24-IN DIA., ALL DEPTHS	EA	1	\$ 25,000.00	\$ 25,000.00
8	511S-B	FIRE HYDRANT WITH 6-IN GATE VALVE	EA	3	\$ 6,500.00	\$ 19,500.00
9	511S-F	AUTOMATIC COMBINATION AIR/VACUUM RELEASE VALVE ASSEMBLY, 4-IN DIA.	EA	1	\$ 15,000.00	\$ 15,000.00
10	609S-D	NATIVE GRASSLAND SEEDING AND PLANTING	AC	1.5	\$ 33,400.00	\$ 50,100.00
11	641S	STABILIZED CONSTRUCTION ENTRANCE	EA	1	\$ 3,500.00	\$ 3,500.00
12	642S	SILT FENCE FOR EROSION CONTROL	LF	1,400	\$ 4.00	\$ 5,600.00
13	700S-TM	TOTAL MOBILIZATION PAYMENT (±5%)	LS	1	\$ 20,800.00	\$ 20,800.00
14	702S-G	REMOVAL AND RELOCATION EXISTING BARBED WIRE FENCE	LF	50	\$ 10.00	\$ 500.00
TOTAL COST is the quantity of the bid item multiplied by its unit cost (Rounded up to the nearest hundred).					SUBTOTAL =	\$ 436,800.00
					Bonds & Insurance (±3%) =	\$ 13,200.00
					O&P (±5%) =	\$ 21,900.00
					Contingency (±5%) =	\$ 21,900.00
					GRAND TOTAL =	\$ 493,800.00